

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 41
5640595

BETWEEN L
 Applicant

 A N D W
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Peter Cahill, Advocate for Applicant
 Kathryn Dalziel and Amy Kennerley, Counsel for
 Respondent

Investigation Meeting: 3 March 2017 at Christchurch

Submissions Received: 3 March 2017

Date of Determination: 22 March 2017

**PRELIMINARY DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A The application of L for leave to raise personal grievances after the expiry of the 90 day period specified by s 114 of the Employment Relations Act 2000 is declined.**
- B There are other claims before the Authority under the Holidays Act 2003 and the Wage Protection Act 1983. There are also allegations of breaches and claims for penalties including for breaches of good faith under the Employment Relations Act 2000. Mr Cahill is to advise the Authority when those matters are able to be progressed and a telephone conference will be held.**
- C Costs are reserved.**

Prohibition from Publication

[1] I prohibit from publication the names of the applicant and respondent pursuant to clause 10 (1) of the Employment Relations Act 2000 (the Act). There is reference in this determination to the applicant's membership of a group and sponsorship whilst in the group by a director of the respondent. Membership of the group is anonymous. That anonymity should be preserved and is by virtue of this order.

Employment Relationship Problem

[2] This determination deals with an application for leave by L pursuant to s 114(3) of the Employment Relations Act 2000 (the Act) to raise a personal grievance outside of the expiration of the 90 day period in s 114 (1) of the Act.

[3] W Limited is a duly incorporated company having its registered office in Christchurch. It opposes the application for leave to raise a personal grievance after the expiry of the 90 day period.

The issues

[4] The Authority needs to be satisfied under s 114 (4) of the Act, if it is to grant leave to raise the grievance outside of the 90 day period, that the delay in raising the personal grievance was occasioned by exceptional circumstances and further that it is just to grant leave.

[5] L relies on two exceptional circumstances in s 115 of the Act. The first is that she has been so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within the period specified in s 114(1) of the Act – s 115 (a). The second is that the employment agreement did not contain the information concerning the resolution of employment relationship problems it is required to under s 65 of the Act.

[6] Section 115 provides non-exhaustive examples of exceptional circumstances against which the application under s 114 (4) can be considered by the Authority. One of the circumstances relied on does not fit, or at least fit particularly neatly, into the s 115 (a) example but will be considered as it is a circumstance relied on.

The personal grievances alleged and when they were raised

[7] Mr Cahill confirmed that the grievances alleged are unjustified actions causing disadvantage and an unjustified constructive dismissal. The relationship between L and W Limited ended on 13 April 2014 when L resigned. The evidence did not support that a grievance was raised at that time or at an earlier point of time although issues with payment of wages and hours worked had, I accept, in all likelihood been discussed from time to time during the relationship.

[8] It is common ground that the next communication about any employment relationship problem arose on 8 August 2016 when a letter was provided by L to one of the directors of W Limited, requesting an attendance at mediation in regard to *previous employment and wages/ holiday pay*. The director was asked to provide the last six years of employment records and responded to L by letter dated 19 August 2016 enclosing a USB stick with *Pay advices on paper being scanned on to the USB*. He wrote that he saw no need to attend mediation as all matters were resolved at the conclusion of employment.

[9] Following that communication, which could not be said to have raised a personal grievance, a statement of problem was lodged with the Authority on 7 September 2016 naming the director as the respondent.

[10] There were a number of problems that L wished the Authority to resolve set out in the statement of problem. Some of these will not be affected by this determination as they are claims under the Holidays Act 2003 and Wages Protection Act 1983. One of the problems raised in the statement of problem about workplace bullying and stress is in the nature of a personal grievance.

[11] W Limited lodged a statement in reply to the application on 3 October 2016. It advised that the director never employed L, the employment was with W Limited and that it did not consent to any personal grievance being raised outside 90 days. There was a claim for money it said was owed by L.

[12] Mr Cahill was then instructed by L. An amended application dated 26 October 2016 was lodged with the Authority and it was confirmed that the correct identity of the respondent was W Limited rather than the director. A further amended statement of problem was then lodged on 23 January 2017 which expanded on the

allegations made and set out, I find, clearly for the first time that L was unjustifiably constructively dismissed.

Exceptional Circumstances

[13] The commencement of the employment relationship was in 2002. W Limited was incorporated in 2005 and it is likely employment until that time was with a director. The only employment agreement the Authority was provided with was a signed agreement dated 14 February 2007 between L and W Limited.

[14] The employment relationship ended on 13 April 2014 when L resigned and did not work out what appeared to have been previously discussed notice. The evidence supports that it is likely the director knew L was going to start up her own business which she did two to three months following the termination of the employment relationship. There is a dispute about whether L took some clients with her by agreement from W Limited or whether she simply completed existing arrangements with the clients. I do not need to resolve that dispute.

[15] L belonged to a group programme for about 17 years, the identity of which I prohibit from publication. She was sponsored in the programme by a director of W Limited who she described as a prominent leader for about 15 and half years. L described the philosophy of the group as total surrender to the sponsor, including surrender of thoughts and feelings. She said that her sponsor controlled all aspects of her life and the philosophy of the programme was centred around not fighting anything and simply focusing on surrender.

[16] L said she was unable to raise a grievance within 90 days because she was *indoctrinated by the programme and that it took her 2 years to gain confidence and clarity.*

[17] L attended only a few meetings with the same group after the employment relationship ended on 13 April 2014 but she said in her evidence she continued to be affected and needed to *debrief from that.* The sponsorship ended a day or so after the employment relationship ended in April 2014.

[18] The meaning of exceptional circumstances is “*unusual – outside of the common run*” - *Creedy v Commissioner of Police* (Supreme Court).¹ The

¹ [2008] ERNZ 109 at [26]

circumstances about the sponsorship as described by L; surrendering decision making at every level to a director of the employer could be exceptional and may fall outside or at least not neatly into the circumstances described in s 115 (a). In assessing the circumstances therefore I have not limited my consideration to the circumstances in s 115 (a) and s 115 (c) of the Act.

The sponsorship

[19] The ending of that sponsorship, L said, was a potential fear for her if she left employment and/or pursued any concerns arising from employment. The potential fear became a reality very shortly after the employment relationship ended in April 2014. That fear of the sponsorship ending could not constitute an exceptional circumstance that occasioned delay beyond a few days after that time and the focus must be on any continued effect on L from the group philosophy and sponsorship.

[20] In her oral evidence L said that she had sought legal advice at or about the time that the employment relationship ended on 13 April 2014. That evidence did not appear in her written statement of evidence. It does though support some insight in or about early 2014 about obtaining independent advice from a lawyer about her employment relationship.

[21] L said that after the employment relationship ended she still attended another group (the second group) under the umbrella of the same programme but stopped going to the first group. L said the second group was not as extreme as the first group and in answer to a question from Ms Dalziel said that she supported a bid to have the activities of the first group looked into when there was discussion about concerns with that group. L therefore was able to undertake in some analysis or discussion about the activities of the first group after the employment relationship ended with others who were also concerned.

[22] L was able to operate her own business including obtaining advice about tax and GST from an accountant within two to three months of the termination of the employment relationship. She continued to operate her business for about two years although at the time of the investigation meeting was an employee again. L said in her evidence that she had started to think about concerns with W Limited about the wages and payments some time before she raised her personal grievance.

[23] After the employment relationship ended leading up to the raising of the personal grievance in or about September 2016, L confirmed that she had not sought any further legal advice or any advice of a psychological/medical nature. The medical evidence provided to the Authority, which I prohibit from publication, was historical and related to 1991 and 1996.

[24] I accept as likely L experienced loss of confidence as a result of her experiences with the group, her sponsor and the group philosophy. She was though able to make some decisions that showed insight and a level of ability to function and make decisions for the future beyond simple day to day coping. L obtained legal advice at the time the employment relationship ended in 2014 and made decisions about her business. She stopped attending meetings with the first group very shortly after 14 April 2014 and when attending a second group gained some insight into the activities of the first group, including that they may not be appropriate.

[25] Balanced against those matters there is no medical or psychological evidence for the relevant period to support that L remained so affected by the circumstances that she could not properly consider raising a personal grievance within the statutory time frame and a considerable period after that.

[26] I am not satisfied as I must be under s 114 (4) of the Act that the delay in raising the personal grievance for a period of almost two and a half years was occasioned by the exceptional circumstance of the sponsorship.

Section 115 (a)

[27] The Employment Court in *Telecom NZ v Morgan*² considered the statutory test for exceptional circumstances set out in s 115 (a) of the Act and found there were three elements necessary to meet the test. The first was that the consequences of the dismissal or other matter giving rise to the grievance must have been severe. The second was that the effects of the dismissal or other matter giving rise to the grievance must have caused the employee to be unable to properly consider raising the grievance. The third was that the phrase “within the period specified” appeared to have required the incapacity to exist for the whole of the 90 day period. It was considered in *Morgan* that a high standard of proof was necessary to meet the statutory test.

² [2004] 2 ERNZ 9

[28] The threshold is high under this test to satisfy s 115 (a) of the Act and requires the effects of the dismissal or other matter giving rise to the grievance to cause the employee to be unable to properly consider raising the grievance.

[29] The circumstance relied on under s 115(a) of the Act is the sponsorship and the group philosophy and resulting effects on L's confidence and clarity. It was stated in *Morgan*³ that it was not impossible to conceive of cases where the consequences of employment events giving rise to a grievance will be so serious and the resulting incapacity to properly consider raising the grievance will last for more than 3 months. It was stated most cases are unlikely to meet that test.

[30] L was able to and did seek legal advice at the time or shortly before the employment relationship ended and was able to make other significant decisions about her own business. There was no medical evidence satisfying me that the effect of sponsorship and the group on employment events was so serious it prevented proper consideration of raising a grievance within the whole of the 90 day statutory timeframe and beyond that three month period.

[31] The high threshold required under s 115 (a) of the Act is not, I find, met. I am not satisfied that the delay in raising the personal grievance was occasioned by the exceptional circumstance set out in s 115 (a) of the Act.

Section 115 (c)

[32] It is accepted that the employment agreement does not contain the explanation concerning the resolution of employment relationship problems as required under s 65 of the Act which includes reference to the 90 day period.

[33] Clause 9 of the employment agreement is headed dispute. Clause 9.2 provides that either party undertakes to bring any dissatisfaction to the attention of the other as soon as it arises to ensure immediate rectification. Clause 9.3 provides that disputes or disagreement must be attempted to be resolved without recourse to third parties and that they will be brought to the attention of the other party in writing. Clause 9.4 contains a dispute resolution provision not consistent with the Act.

[34] L agreed, from time to time she was able to raise issues in the workplace. L said that her knowledge about employment law was limited but there was no evidence

³ Above n 2 at [25]

to support that the delay after the end of the employment relationship in raising personal grievances was due to the lack of the explanation about the resolution of employment relationship problems in the employment agreement.

Conclusion

[35] In conclusion I am not satisfied on the balance of probabilities that the delay in raising the personal grievances was occasioned by the exceptional circumstances relied on for reasons I have set out above.

[36] I do not need to determine therefore whether it would be just to allow the applicant to raise the grievance out of time.

[37] There remains for determination claims under the Holidays Act 2003 and the Wages Protection Act 1983. Mr Cahill is to respond to information provided by Ms Dalziel after he has completed an assessment of information about hours and times worked provided to him by L. There is also a claim for penalties in the second amended statement of problem which seem to include penalties for alleged breaches of good faith under the Employment Relations Act.

[38] Mr Cahill should advise the Authority when the matter is ready to set down for a telephone conference so that the remaining claims can be discussed and progressed.

Costs

[39] I reserve the issue of costs.

Helen Doyle

Member of the Employment Relations Authority